In the Supreme Court of Chittenden (Vt.) County, December, 1856.

WILLIAM P. BRIGGS *vs.* S. W. TAYLOR.

1. Negligenc is a mixed question of law and fact.
2. A judge is not bound to submit to a jury questions of fact which uniformly result from the course of nature; this uniformity of nature becomes a rule of law.
3. Meaning of the phrases, "ordinary care" and "gross negligence." Authorities cities and discussed.
4. Any injury to property in custody of an officer under attachment, caused by his apparent negligence or want of care, renders him prima facie liable, and imposes upon him the burden of showing a valid excuse.

The opinion of the court was delivered by

REDFIELD, Ch. J.—I. In regard to the carriage, and the wagons and sled, which were not past use, although the carriage was an old one, and the wagons and sled were described by the witnesses, as being "not very new nor very old," it seems to us there was no testimony in the case tending to show that an officer who held them under attachment, would be fully justified in letting them stand out-doors all winter. We could scarcely conceive of a State officer justifying such a course, short of absolute necessity, which it would seem would never occur when boards could be obtained. And where there is no testimony, tending to excuse an officer in such case, it becomes a mere question of damages. Questions of negligence are said in the books to be mixed questions of law and fact, but where there is no testimony tending to show negligence, or where a given course of conduct is admitted, which results in detriment, and no excuse is given, the liability follows, as matter of law, and there is nothing but a question of damages for the jury.

We do not think a judge is ever bound to submit to a jury questions of fact, resulting uniformly and inevitably, from the course of nature, as that such carriages will be injured more or less by exposure to the weather during the whole winter, or that a judge is bound to submit to a jury the propriety of such a course, when it is perfectly notorious that all prudent men conduct their own affairs differently. This uniformity of the course of nature or the conduct of business, becomes a rule of law. But while there is any uncer-

tainty, it remains matter of fact, for the consideration of a jury. It could not be claimed, that it should be submitted to a jury whether cattle should be fed or allowed to drink, or cows be milked.

II. As from the determination of the first point, a new trial becomes necessary, it will be of some importance to inquire, in regard to the proper mode of defining the duty of the officer in keeping goods, attached on mesne process. It is usually defined in practice, in this State, certainly so far as we know, much as it was in this case, by the use of the terms, "ordinary and common" care diligence, and prudence. And it is probable enough, these terms might not always mislead a jury. But it seems to us, they are somewhat calculated to do so. If the object be to express the medium of care and prudence among men, it is certain these terms do not signify a fixed quality of mediocrity even. For if so, they would not be susceptible of the degrees of comparison, as more ordinary and most ordinary, which medium, and middle, and mean, are not. The truth is, that ordinary and middling and mediocrity even, when applied to character, do import, to the mass of men, certainly, a very subordinate quality or degree. Something quite below that which we desire in an agent or servant, and which we have the right to require in a public servant, especially. A man who is said to be middling careful or ordinarily careful, is understood to be careless and is sure never to be trusted.

We have been at some pains to look into the English books upon this point, and although there may be some exceptions, the general rule certainly is, among the English judges, to express common care and ordinary care, by terms less liable to misconstruction, and as we think, likely to be more justly appreciated by juries. In *Duff* vs. *Budd*, 3 Brod. & Bing. 177, the rule is laid down by Dallas, Ch. J. to the jury, in these words: "Gross negligence is where the defendant or his servants had not taken the same care of the property as a *prudent man would have taken of his own*," and the judgment is affirmed by the full bench. In *Riley* vs. *Horne*, 5 Bing. 217, Best, Ch. J. says of a carrier, "the notice will protect him, unless the jury think that *no prudent person*, having the care of an important concern of his own, would have conducted

himself with so much inattention, or want of prudence." In *Batson* vs. *Donovan*, 4 Barn. & Ald. 32, the same learned judge lays down the rule thus: "They must take the same care of it that a *prudent man* does of his own property. This is the law with respect to all bailees for hire or reward." In *Wyld* vs. *Pickford*, 8 M. & W. 443, Parke, B. seems to claim a distinction between gross negligence and ordinary neglect, but admits ordinary neglect may be correctly defined in the above cases. But in *Hunter* vs. *Debbin*, 2 Queen's B. 644, Denman, Ch. J. said in regard to gross negligence, "it might have been reasonably expected that something like a definite meaning should have been given to the expression," "in none of the numerous cases referred to on the subject is any such attempt made, and it may well be doubted whether between 'gross negligence,' and negligence merely, any intelligible distinction exists." But the English cases all seem to agree in defining ordinary negligence as that which a *prudent man* does not allow in the conduct of his own affairs, and most of the later cases, where the question has arisen, both English and American, repudiate the old attempt to distinguish three distinct degrees of diligence and the cumulative degrees of negligence. In *Wilson* vs. *Brett*, 11 M. & W. 113, Baron Rolfe makes some very pertinent remarks upon this subject. "I said I could see no difference between *negligence* and *gross* negligence, that it was the same thing, with the addition of a vituperative epithet." And in *Austin* vs. *The Manchester R. R.* 11 Eng. L. & Eq. 513, Cresswell, J. refers to the language of Lord Denman quoted above, with approbation, and in the *Steamboat New World* vs. *King*, 16 Howard U. S. 474, Mr. Justice Curtis seems to adopt a similar view in rgard to these distinctions being more or less unintelligible, and in practice often leading to misconstruction and misunderstanding. It seems too that these distinctions are repudiated by many of the continental jurists in Europe, as producing more uncertainty than they need, 6 Toullier's Droit Civile, 239, 11 id, 203, and although it seems we have adopted these distinctions in the degrees of diligence and negligence from the Roman civil law, I do not find the commentators on that law adopting our loose manner of expressing what is required of a bailee for hire. Domat,

part 1, book 1, tit. IV, sec. VIII, art. III, thus expresses the care of such bailees: "He who undertakes to keep cattle, ought to preserve that which is entrusted with all the care that is possible to be taken by persons who are the most watchful and diligent." And this is really synonymous with the rule adopted by the English courts. Mr. Justice Story, Bailments, § 11, in order to mention the old definition of three grades of diligence, defines it much in the manner it was done in the present case. "Common or ordinary diligence is that degree of diligence which men in general exert in respect to their own concerns," which certainly leaves upon the mind a different impression from the definition of Domat and the English judges, and we cannot but regard it as one calculated to mislead juries; and this very writer, in § 13, adopts the diligence of "prudent men," as the measure of common diligence, and it seems to us nothing short of this will do justice in a case like the present.

It may with some plausibility be said, that one who employs a man known to the employer to be habitually indifferent to the management of his own concerns, has no right to expect him, all at once, even for reward, to assume a wholly different character, and the jury would be likely so to decide, the question being ordinarily one of fact, when the testimony raises any doubt; and when one employs a man of skill and talent in the management of his own affairs, he may justly expect him to exert the same skill and talent, to the same extent in the management of the business which he undertakes for others; and in the case of a public officer who is selected for his fitness for the particular trust, every one may justly expect all the care and diligence, which men entirely competent and careful could reasonably be expected to exert in their own business of equal importance.

The absurdity of this measure of duty in a public officer will become sufficiently obvious, if we advert to the form of the oath or of the official bond of public officers; what should we think of having one sworn or giving bond to perform his duty as common men ordinarily do such things. This certainly sounds very different from the official oath, "that you will faithfully execute the office to the

best of your judgment and ability," and an official bond obliges officers to the strictest, most faithful performance of all their duties. Any other standard would sound absurd, and it is obvious to us, that the case of *Bridges* vs. *Perry*, 14 Vt. 262, was not intended to introduce any different rule of liability upon officers in keeping property, as said in Drake on Att. § 273, "The officer must comply with all the requisitions of the law," (one of which is, to keep safely, property attached on mesne process, and restore it when required by law,) "or show some legal excuse for not doing so." Hence in *Sewall* vs. *Marston*, 9 Mass. 530, an officer was held bound on mesne process, five years before, ready for sale on the execution, and in *Tyler* vs. *Ulmer*, 12 Mass. 163, it was held, an officer could not in such case excuse himself for not producing cattle, by showing that from the scarcity of fodder they could not have been kept alive.

Any injury or loss in such cases, renders the officer *prima facie* liable, and imposes upon him the burden of showing some valid excuse. *Logan* vs. *Matthews*, 6 Barr, 417, Story on Bail. § 411. *Platt* vs. *Hubbard*, 7 Conn. 501, *Burt* vs. *Millar*, 13 Barbour, 482. There is undoubtedly some contradiction in the cases, in regard to the burden of proof of negligence in the ordinary care of bailments for hire, but there can be no doubt, we think, in regard to the question in the present case. This is expressly so laid down in *Bridges* vs. *Perry*. The court in that case, as will be obvious from a careful examination, had no purpose of excusing this class of officers from any degrce of care and diligence, which careful men would expect under the circumstances.

And this, it seems to us, is the true measure of liability in all cases of bailment. The bailee is bound to that degree of diligence, which the manner and the nature of his employment makes it reasonable to expect of him; any thing less than this is culpable in him, and renders him liable. The conduct of men in general in the region where the attachment was made, may be some guide to what ought to be required of the defendant in keeping property attached. We mean, of course, prudent and careful men, for no one is expected to go very essentially beyond the common custom of the country

in such matters, as it must be attended with extraordinary expense and a question might thereby arise as to the propriety of incurring such expense.

Judgment reversed, and case remanded.

In the Supreme Court of Pennsylvania, January 1857.

SUNBURY AND ERIE RAILROAD COMPANY *vs.* HUMMEL.

1. The liability of Railroad Companies for damage caused by fire through the negligent management of their engines, is settled at common law. But,
2. They cannot be called upon to make compensation in advance for the risk of fires not included within the common law rule, and no such considerations can operate upon the viewers in fixing the amount of damages to be awarded to the land-owner.
3. The Legislature, in requiring the viewers to take into consideration the advantages and disadvantages resulting from any public improvement, as a railroad, did not authorize them to enter into remote and contingent future and speculative damage; full compensation according to the best estimates that can be obtained, would seem to be the true rule.

The majority opinion of the court was delivered by

LOWRIE, J.—Railroad companies are liable at common law for the damages done by fire occasioned by the negligent management of their locomotive engines; and therefore it is plain that for the risk of such damage, no compensation can be allowed at the taking of the land for the construction of the road, 23 State R. 373. Must they make compensation in advance for the risk of fires not covered by this rule. The charter of this company does not expressly say that they must; and therefore we must inquire what may reasonably be presumed to have been the intention of the legislature when they granted the charter. To aid us in this, it is proper to refer to what the legislature have usually done in such cases. In no charter that we know of have they ever in terms provided for such compensation, and the State did not allow it when it constructed the railroads from Philadelphia to Columbia, and from Hollidaysburg to Johnstown. And in making the State canals and authorizing other navigation improvements, the corresponding risk of dams